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DISPOSITION OF PROPERTY AND TAXATION

Part I.—Discretionary Settlements

by

BRIAN MCMAHON, LL.M.

Solicitor of the Supreme Court of New South Wales

The basis of all schemes for the arranging of a man's affairs so that he attracts to himself the minimum of taxation is the separation of the taxpayer from his property. This follows from the simple fact that taxation is levied on property, on income, or on persons in respect of their property, so that the less property a person has, the less taxation he pays. Whenever it is intended to dispose of property, a conveyancer should have in mind all the revenue implications of the transaction. In this series of articles, it is proposed to explore various methods of disposing of property to the best taxation advantage of the settlor and the beneficiaries. Among the matters to be considered will be the private company, the sale of a business, superannuation funds, partnerships, and the subject of this article—discretionary settlements.

Discretionary settlements

Discretionary settlements were formerly widely used to protect spendthrift beneficiaries. Although the objects of the settlor have changed over the years, the form of the settlement has remained basically the same, the altered aims being reflected only in the lacey refinements and subtleties in which the documents have been clothed. In essence they are a settlement of property by a settlor on trustees upon trust to pay the income, and possibly the capital, to such one or more of the specified beneficiaries as they think fit.

Advantages of settlement

Shortly the advantages are: (1) That the settlor's estate is diminished by the extent of the disposition both for income tax and death duty purposes.[1] (2) The income of the trust estate can be accumulated and as no person need be presently entitled to it, tax will be levied on it as if it were the income of a private person;[2] but because of the graduation of income tax, the saving would be the difference between the tax levied on the whole of the settlor's income including the trust income and the tax levied on the settlor's diminished income plus the tax on the trust income. Thus if a settlor has a private estate of £50,000 from which he derives an income of £5,000, he

[1] *Stamp Duties Act* 1920-1956, s. 102 (2) (d). See *infra.*

[2] *Income Tax and Social Services Contribution Assessment Act* 1936-1957, s. 99. See *infra.*

would pay £1,701.5.0 income tax on it. Suppose he settled £10,000; the tax on his diminished income of £4,000 would be £1,196.5.0 and the tax on the trust income of £1,000 would be £106.5.0, making a total of £1,302.10.0—a saving in income tax alone of £398.15.0 per year.[3] (3) As none of the beneficiaries is absolutely entitled to anything under the trust and as no calculable benefit passes on the death of one of the possible objects, death duty need not be paid on any part of the trust estate during the continuance of the settlement.[4]

Trustees

The first question that arises in making such a settlement is who are to be the trustees? It will be obvious that the trustees would have wide and discretionary powers. It is in their power entirely to decide how the fund is to be invested and administered and who should participate in any given year in the income or capital of the trust. Can the settlor be a trustee? It would seem on the authority of *Commissioner of Stamp Duties* v. *Perpetual Trustee Co. Ltd.*[5] that he can be one. But s. 102 (2) (d) of the Stamp Duties Act provides that "any property comprised in any gift made by the deceased at any time . . . unless bona fide possession and enjoyment thereof has been assumed by the donee . . . to the entire exclusion of the deceased . . ." forms part of the assessable estate of the deceased. It seems to the writer that if the settlor's children are possible objects of the trust, it could not be argued that the settlor derived absolutely no benefit from the arrangement.[6] The safer course would be to appoint several independent trustees, such as the settlor's solicitor and accountant. The settlor could conceivably form a company of which he retained control for the purpose of acting as trustee of the settlement, but such a course would be fraught with risks.[7]

Duration

The next question is how long is such a settlement to last? A common period which is long enough to make the

[3] The rates of income tax are taken from the Year Book of the Commonwealth of Australia for 1956, Volume 42. Although the rates may differ from year to year, the principle remains the same.

[4] *Stamp Duties Act* 1920-1956, s. 102 (2) (g). See *infra*.

[5] [1943] A.C. 425; 67 C.L.R. 234.

[6] It could easily be argued, for example, that to the extent that money was paid to or for the benefit of his children, the settlor was relieved of his obligations relating to their maintenance and education. If he were trustee (and especially if he were sole trustee) his control over the funds and therefore over his relief from his obligations would be greater. See generally Wheatcroft's "Taxation of Gifts and Settlements", 2nd ed., pp. 116-7.

[7] It would, in fact, be little better, from a death duty point of view, than retaining the appointment as sole trustee.

settlement worthwhile, yet short enough to comply with the rule against perpetuities, is "until the expiration of twenty-one years after the death of the last survivor of the issue now living of His late Majesty King George V". For reasons which appear later in this article, the life of one of the possible objects is not chosen as the yardstick for measuring the life of the trust. Because of the public position of the persons mentioned it would be possible to point with accuracy to the point of determination of any trust. The choice of an earlier sovereign might defeat this object because the descendants might be so numerous as to make it impossible to decide when the trust ended.[8] It is necessary to provide in the document for a resulting trust on the determination of the trust period. The settlor should never be the object of the resulting trust for obvious reasons.[9]

Grandparents and grandchildren

Because of the various provisions in the Income Tax and Social Services Contributions Assessment Act relating to the children of settlors, greater advantage can be derived from a discretionary trust if the settlement is made by a grandparent and grandchildren are included as the possible objects.[10] For example, under s. 102 of the Act, where a person has created a trust and the income under that trust is in the year of income payable to or accumulated for or applicable for the benefit of a child or children of that person who is under 21 and unmarried, that income is treated as the settlor's for tax purposes. Under a discretionary trust, income may be accumulated but can not be said to be accumulated for or applicable for the benefit of any person until the trustees so resolve. Section 101 provides that a beneficiary in whose favour the trustee exercises his discretion shall be deemed to be presently entitled to the amount paid to him or applied for his benefit. Thus if during a year of income the trustees decide to pay part or whole of the income to a beneficiary and that beneficiary is an unmarried minor child of the settlor, no advantage is gained from the settlement from the income

[8] *Re Villar*, [1929] 1 Ch. 243.

[9] It could well become a revocable trust under s. 102 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1957. See *I.R.C.* v. *Countess of Kenmare* (1957), 3 W.L.R. 461, and *I.R.C.* v. *Saunders* (1957), 3 W.L.R. 474.

[10] Since *Hobbs* v. *Federal Commissioner of Taxation* (Vol. 31, Australian Law Journal—decided 4 September 1957), this requirement has diminished in importance and s. 102 (1) (b) has been weakened. The High Court held that in a settlement by a mother of shares for her child upon that child's attaining the age of 25 or marrying under that age, the income being accumulated in the meantime, such income did not fall within s. 102 (1) (b) as the infant was only contingently entitled.

tax point of view. The position is different if the settlor is the grandfather of the beneficiary or if the income is accumulated by the trustees.

Section 99 provides that where there is no beneficiary presently entitled to the income the trustee shall be assessed and be liable to pay tax on that income as if it were the income of an individual. The savings that can be made by accumulations under a discretionary trust in view of that section have been illustrated above.

Death duty

Section 102 (2) (g) of the *Stamp Duties Act* 1920-1956 introduced a new occasion for the imposition of death duty in N.S.W. It provides that there should be included in the deceased's dutiable estate "any property in which the deceased or any other person had . . . an estate or interest limited to cease on the death of the deceased or at a time determined by reference to the death of the deceased . . . to the extent to which a benefit accrues or arises by cesser of the limited interest . . ." Suppose there were four possible beneficiaries under a discretionary settlement and one dies. Can it be argued by the Commissioner that as there are fewer persons to share the benefits of the trust, there must be a benefit that passes on the death of the possible beneficiary? I do not think that there can be any doubt that this can not be put forward successfully.[11] On the death in question, the discretionary trusts continue with the only qualification that one of the possible objects no longer exists.

If any benefit does pass, there is no way in which it can be calculated. There is nothing which can be valued by the method set out in the section itself.[12] Furthermore, it seems that no benefit within the meaning of the paragraph has accrued or arisen.[13] Could it possibly be said, in any case, that the other possible beneficiaries had an "estate" or "interest" in the trust property? Their rights are no more than the right to be considered by the trustees as possible beneficiaries.[14]

Death of beneficiary

A curious position might arise under this paragraph, not on the death of a possible beneficiary, but on the death of "the last survivor of the issue now living of His Late

[11] This seems to be the official view taken by the Revenue in England. See note in (1957) British Tax Review, p. 258.

[12] *A.G.* v. *Wood*, [1897] 2 Q.B. 102 at 108.

[13] In *Re Duke of Norfolk; Public Trustee* v. *I.R.C.*, [1950] Ch. 467, at p. 486.

[14] This point of view makes the death duty aspect of the discretionary trust even more attractive. A large number of possible beneficiaries can be included and property can be kept for generations in the family (within the limits of the trust period) without once being depleted by death duty.

Majesty King George V" if such a person happened to be domiciled in N.S.W. Under s. 102 (2) (g) of the Stamp Duties Act, it is not necessary that the deceased himself should have an interest limited to cease on his death; if any other person has such an interest or an interest limited to cease at a time determined by reference to his death, the benefit accruing on the cesser of the limited interest forms part of the non-aggregable estate of the deceased. Thus, twenty-one years after the death of this royal personage the trustee's estate will come to an end and the whole of the remaining trust property will pass under the resulting trust. Strictly speaking, therefore, this property should form part of the dutiable estate of the royal person, even though he knew nothing of the trust.[15] This is an absurd situation, but it could be serious if the trust period were limited by reference to the life of, say, one of the possible beneficiaries. On the cesser of a discretionary trust it has been held that duty would be payable on the whole of the trust fund even though one of the objects of the trust becomes solely entitled to the income.[16] However, if the trustees have sufficient power to distribute capital, there should not be anything left in the trust estate at the end of the trust period.

Death of settlor

Two matters should be mentioned. From a death duty point of view, a discretionary settlement, like any other voluntary disposition, depends for its success on the settlor surviving for three years after the settlement. Section 102 (2) (b) of the *Stamp Duties Act* 1920-1956 and s. 8 (4) of the (*Commonwealth*) *Estate Duty Assessment Act* 1914-1953 coraal into the deceased's dutiable estate all such dispositions made within three years. Secondly, s. 11 of the (*Commonwealth*) *Gift Duty Assessment Act* 1941-1953 imposes gift duty on voluntary dispositions. However, gifts not exceeding in the aggregate value the sum of £2,000 over a period of 18 months are exempt from duty. A prospective settlor may therefore settle a non dutiable sum on his trustees and at regular permitted intervals, pay further amounts to his trustees to hold upon the trusts of the original deed.

Distribution of family property

Despite these disadvantages, the discretionary settlement may be, in many family circumstances, the ideal method of distributing the family property more evenly.

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[15] It would be a touch of whimsy if the trust period was limited to cease at a time determined by reference to the death of the Commissioner of Stamp Duties or the Treasurer.

[16] *Scott* v. *I.R.C.*, [1937] A.C. 174.

INTERDUM

by

SCRUTATOR

Condonation and Revival of Cruelty

A case of unusual interest to practitioners came before the English Court of Appeal last October in matrimonial jurisdiction, the appellant being the respondent wife. *Benton* v. *Benton*, [1957] 3 All E.R. 544, which occupied the attention of their Lordships (HODSON, MORRIS and SELLERS, L.JJ.) for three days, illustrates the rock-like permanence of the old rule as to condonation notwithstanding ingenious attempts made from time to time to evade it. Incidentally, sundry intimate details in the judicially reviewed evidence almost have the effect of making a reader feel as if he were renewing his acquaintance with the writings of Boccaccio or Casanova.

At the trial, which dragged its slow length along for six days, MR. COMMISSIONER GRAZEBROOK pronounced in favour of the petitioning husband a decree *nisi* of divorce based on the wife's cruelty, which took the form of false accusations knowingly made against him of sodomy and attempted sodomy on her and adultery.

The evidence adduced by the husband and accepted by the Commissioner was to the following effect. After twelve years of married life he abandoned the matrimonial home. By that time the wife had become addicted to alcohol and while she was under the influence of it her behaviour towards him was aggressive, violent and disgusting, and resulted in injury to his health. He was on the verge of a nervous breakdown and lost a great deal of weight, which he attributed to her conduct. He admitted that he himself consumed considerable quantities of gin in her presence as a preliminary to sexual intercourse.

The proceedings for divorce were instituted by the husband within three months of the parting. The ground on which he sought it was cruelty. Although the suit was still pending, he frequently visited the wife, primarily for the purpose of seeing the children—two boys born in the second and third years respectively of the marriage. He habitually spent a great deal of time with her alone, without the children. On those visits, which lasted as long as four hours, the wife, when the children had gone to bed or were elsewhere, fondled and caressed him, undressed in front of him and made suggestions so as to induce him to have sexual intercourse with her. He admitted that, yielding to her persuasion, he had sexual intercourse with her on one such occasion: it occurred in a park, in her caravan, where she was then living.

Twelve days after that encounter the wife, in her answer to his petition, said that the cruelty, if any, had been condoned. She made counter-charges of cruelty, sodomy on her and attempts at sodomy and adultery. In his reply the husband denied the charges and in a subsequent amendment thereof—made six months later—said that if the act of sexual intercourse amounted to condonation, the cruelty had been revived by the wife's false accusation against him of attempted sodomy on the same occasion.

At the trial the husband's endeavour to escape from the *impasse* which his admission of sexual intercourse in the caravan had created was twofold. First, he attempted to prove that the sexual intercourse on the occasion in question was in reality an involuntary act, though he had not said so in his pleading. He called his personal physician to prove the effect of an overdose of largactil, a drug which the witness had prescribed and of which the petitioner had been induced by the wife to take an overdose on that occasion. This expert's evidence was that the drug, taken in large doses, although described as a "tranquillizer" would have an effect comparable with that of drunkenness, in removing the emotional inhibitions which people of normal sensitivity have, i.e., causing them to feel less restrained in their actions than they would if they had not taken drink; but he did not suggest that the petitioner's reasoning powers would be affected. In fact, the husband, who had been cross-examined closely, admitted that at the time of such intercourse he knew what he was doing and described in detail the events of that day, including the whole performance in the caravan. On the evidence the act was a voluntary act. The Commissioner came to a different conclusion, but the Court of Appeal said that on the evidence any other conclusion was quite impossible.

The second branch of the husband's argument involved, not a mere question of fact, but a question of law, the statement of which constitutes the real value of the report as an authority on a difficult point. In the course of the principal judgment, with which the two other members of the court agreed, HODSON, L.J., said: "I am of opinion that charges of this nature, when they are false, and knowingly false, are sufficient to revive condoned adultery . . . I think that to the ordinary man that is perfectly true, and none the less true because the charge relied on was made in a pleading". Turning to the authorities, his Lordship referred to *Henderson* v. *Henderson*, [1944] 1 All E.R. 44. There VISCOUNT SIMON, L.C., after quoting *Snow* v. *Snow* (1842), 2 Notes of Cases, Supp. i,—where Dr. Lushington expressed the opinion that

subsequent cohabitation is not universally a bar to the wife's suit—added that he knew of nothing in the earlier decisions which supports the view that a husband who has intercourse not induced by the fraud of the wife, after knowledge of the facts of the wife's adultery, should not thereby be regarded as condoning the wife's misconduct. The word "misconduct" in that speech covered both adultery and cruelty, and his Lordship saw no reason to distinguish the two matters. The proper test to apply in determining what would be sufficient to revive cruelty was that the subsequent conduct of the spouse must be such as to make married life together impossible (*Richardson* v. *Richardson*, [1949] 2 All E.R. 330, at p. 332; [1950] P. 16, per BUCKNILL, L.J., following the dictum of JEUNE, P.). DENNING, L.J., said: "The subsequent conduct may consist of harshness of behaviour short of cruelty . . . harshness, or neglect of a real and substantial kind which is such as to be likely to inflict misery on the innocent party and does indeed lead to a breakdown of the marriage is sufficient to revive the original offence" (ibid., at p. 333).

Applying that test, HODSON, L.J., after referring to the belated formulation of the full plea of revival commented on the petitioner's attitude towards the wife's false accusation. The husband never complained or expressed his resentment or gave any evidence that it had any influence at all in preventing the continuance of the reconstitution of the marriage which had been brought about by the condonation. Indeed, his evidence as to frequent visits to his wife tended to the contrary. There was nothing in his conduct to indicate that this allegation of the wife had any effect whatever on him; and if what was said in *Richardson* v. *Richardson*, *supra*, was correct, that, in his Lordship's view, determined against the husband the issue of revival.

The appeal was allowed and leave to appeal to the House of Lords refused.

ARTIFICIAL INSEMINATION

CONTRIBUTED

The Court of Session decided in *Maclennan* v. *Maclennan* (The Times, January 11, p. 6) that a woman whose child was born to a man not her husband, but was the result of artificial insemination without her husband's consent, was not guilty of adultery. LORD WHEATLEY, who delivered the preliminary judgment in that case, observed that a woman who was artificially inseminated in order to have a child who would not be the child of her marriage committed a grave offence of contract of marriage, but the question for him to determine was not the moral culpability of such an act but whether it constituted adultery in its legal meaning, and "just as artificial insemination extracts procreation entirely from the nexus of human relationship in or outside marriage, so does extraction of the nexus of human relationship from the act of procreation remove artificial insemination from the classification of sexual intercourse". The decision is, with respect, indubitably right, and it would clearly seem a matter of urgency to give to a husband who has been so wronged a separate legal remedy. The Royal Commission on Marriage and Divorce in England has recommended that acceptance by a wife of artificial insemination by a donor without the husband's consent should be made a new and separate ground for divorce. The Commission's terms of reference did not embrace a consideration of the moral and social implications of artificial insemination, which clearly raises issues that go beyond the marital relationship. It has been suggested that the practice should be made a criminal offence, but that suggestion would probably prove as unacceptable as it would be to revive the ancient penalties for adultery. In any legislation on the subject it will be necessary to deal with the position of children born as the result of the practice, and in view of the grave moral, social and personal issues involved, mature consideration will require to be given to all the aspects of the problems involved before the nature and extent of such legislation is determined.

STATEMENT pursuant to s. 34 of the Estate Agents Acts to be given to purchaser by auctioneer or estate agent selling any real estate or business—Victoria*

[*Contributed by* F. G. DYETT, LL.B., *Barrister-at-Law.*]

1. The situation and description of the property sufficient for its identification are as follows:—

   .....

2. The name and address of the seller is:—

   .....

3. The name and address of the purchaser is:—

   .....

4. (a) The $\frac{\text{auctioneer}}{\text{agent}}$ $\frac{\text{has}}{\text{has not}}$ (by himself or by any of his employees or sub-agents) made or offered to the purchaser any representation, promise or term in respect of the availability of finance for defraying wholly or in part the purchase price.

   (b) Particulars of that representation promise or term and any such finance are as follows:—

   [*A statement whether finance is to be provided by the auctioneer or agent or by way of terms by the seller or from some other* (*and if so, what*) *source should be included.*]

This statement is given to the purchaser on the —— day of —— 19—.

Signed by the auctioneer or agent .....
Receipt of this statement is acknowledged by the purchaser.

[*Signature of purchaser*]

[*Date*]

* A statement in writing to the effect of the above form must be given to the purchaser by an auctioneer who sells by auction and an estate agent who sells as such any real estate or business and the auctioneer or estate agent must obtain an acknowledgment in writing of the receipt of the statement from the purchaser. The statement must be given to the purchaser before he signs any contract agreement or document whatsoever legally binding or intended legally to bind him in respect of the sale (Estate Agents Acts, s. 34 (1) to (3)).

If such a statement is not so given, or if finance is not made available as set out in the statement, and the purchaser has done all things reasonably required to be done to obtain the finance, a purchaser who has not paid the whole of the purchase money or taken possession of the property or by writing under his hand

accepted title to the property may, at his option, within three months after he first signed any contract avoid it by giving notice in writing to the seller or to the auctioneer or agent (ibid., s. 34 (4) and (5)).

A copy of the contract must also be given to the purchaser and an acknowledgment of its receipt in writing obtained from him (ibid., s. 35).

Failure to give a purchaser of real estate or business a statement containing the particulars in the above form before the purchaser signs the contract renders the auctioneer or agent guilty of an offence against the Act and liable to a penalty up to £200 (ibid., s. 34 (8)).

"FAIR WEAR AND TEAR EXCEPTED"*

An exception for "fair wear and tear" or for "reasonable wear and tear" is commonly inserted in leases and tenancy agreements, and in *Taylor* v. *Webb*, [1937] 1 All E.R. 590, SCOTT, L.J., who had presumably made researches in the old books, said that it had been used for two or three centuries. It is to be feared, however, that it is one of those expressions ("fair and tenantable repair" is another) which practitioners insert in their drafts without pausing to consider their exact meaning and effect.

Even as recently as 1901, when by SCOTT, L.J.'s reckoning, the expression must have been in use for at least a hundred and fifty years, BRUCE, J., delivering the decision of a Divisional Court in *Terrell* v. *Murray* (1901), 17 T.L.R. 570, said that it "is a little curious that there is no satisfactory authority as to the meaning of the words 'fair or reasonable wear and tear' ". BRUCE, J. went on to say that in his opinion the meaning of a covenant to repair with an exception for fair wear and tear is "that the tenant is bound at the end of the tenancy to deliver up the premises in as good condition as they were in at the beginning, subject to the following exceptions, that is to say, dilapidations caused by the friction of the air, dilapidation caused by exposure, and dilapidations caused by ordinary use". In *Taylor* v. *Webb* (*supra*), SCOTT, L.J., gave a somewhat similar definition, by saying that fair wear and tear covered two classes of disrepair: (a) that brought about by the normal or ordinary operation of natural causes, such as wind and weather, in contradistinction to abnormal or extraordinary events in nature such as lightning, hurricane, flood or earthquake; and (b) that brought about by the tenant in the course of the "fair" (or "reasonable") use of the premises for any of the purposes for which they were let.

Natural causes and normal use

Even though there may have been no judicial definition, as such, prior to 1901, the fact that the exception was apt to cover both natural causes and normal use had long since been recognized. Thus, in *Gutteridge* v. *Munyard* (1834), 1 Mood. & R. 334, it was accepted that it covered such dilapidations as result from time and the weather, while in *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C.P.D. 507, the second limb was considered. There, a floor in the demised premises had been overloaded with flour by sub-lessees and had collapsed as a result, and it was held that the tenant was liable to reinstate it since the user, being abnormal, was not within the exception for fair wear and tear in his covenant for repair.

* By courtesy of *The Law Journal*, England.

Defence to breach of covenant

The exception is thus a two-pronged instrument of defence in the hands of a tenant who is sued for breach of the repairing covenant to which it is appended. Clearly he cannot avail himself of it where he has used the premises in an abnormal manner for which they were not designed and which was not contemplated by the demise. A much more difficult question is whether he can avail himself of it where defects are caused by the natural operation of time and the elements, but time and the elements would not have wrought the destruction they did but for his failure to fulfil his primary obligation.

In *Gutteridge* v. *Munyard* (*supra*), TINDAL, C.J., laid down that "what the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss, which so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised".

Masterly inactivity

This view that a tenant may not sit back in masterly inactivity and allow time and weather to do their worst and then rely on the exception for fair wear and tear as a defence was accepted again in *Haskell* v. *Marlow*, [1928] 2 K.B. 45. There the defendant was not in fact a tenant, but a beneficiary under a will who was entitled to occupy a house on the terms that she kept it in repair, reasonable wear and tear excepted, so that for this purpose she was in the same position as a tenant. She lived in the house for forty-two years, during which she did nothing actively to injure it, but on the other hand she did nothing adequate to counteract the natural processes of decay, and it was held that in view of the length of time during which no substantial repairs were done, and to the extent of the damage thereby caused, the beneficiary was not protected by the exception. This case was thought to be overruled by the Court of Appeal in *Taylor* v. *Webb* (*supra*), where the whole of the disrepair was due to the action of the elements, on a sky-light, coupled with the absence of any steps by anybody to prevent further progress of the decay, and it was held that the exception protected the person who had entered into a covenant to repair the walls and roof from liability for consequential damage to the rest of the house. The result of this case seemed to be that where the exception for fair wear and tear is present the covenantor is relieved from all his obli-

Australian Conveyancer and Solicitors Journal, June, 1958.

gations under the positive part of his repairing covenant unless it can be shown that the state of disrepair is due to some active or wilful damage committed by him. In other words, the exception on this view protects a tenant against the consequences of what, if committed by a tenant for life, would be permissive waste, but not against the consequences of what would be equitable waste.

Time and weather

This view that all the damage that flows from time and weather is fair wear and tear perhaps received some support from what SOMERVELL, L.J., said in *Warren* v. *Keen*, [1953] 2 All E.R. 1118. In that case the defects included damp and stained plaster on internal walls, a cracked and broken external wall, and window-sills lacking weatherproof joints and with decayed paint work. SOMERVELL, L.J., said it seemed clear that the damage was due to decay of the walls and there was no suggestion that it was due to anything but fair wear and tear. A little later he qualified this by saying that the condition of the window sills might have been due not only to age but also to the failure to repaint at normal intervals. However, though this case throws some light on the meaning of wear and tear it is not strictly in point since the question at issue was the implied liability of a weekly tenant.

Covenants

The recent case of *Brown* v. *Davies*, [1957] 3 All E.R. 401 is, on the contrary, very much to the point as there the Court of Appeal refused to accept *Taylor* v. *Webb* as laying down any rule of general application. It was pointed out that the covenant in *Taylor* v. *Webb* was a topsy-turvy one, being a covenant by a sub-lessor to keep the walls and roofs in repair so far as he was required to do so under the head lease which contained a covenant by him extending beyond walls and roofs, but subject to an exception for fair wear and tear. The unusual form of the covenant in *Taylor* v. *Webb* enabled the Court of Appeal to distinguish its own decision in that case. The Court was clearly fortified in so doing by the fact that the passage from TINDAL, C.J.'s, judgment in *Gutteridge* v. *Munyard* had not been cited in *Taylor* v. *Webb*. In *Brown* v. *Davies* the law as laid down by TINDAL, C.J., was expressly recognized as still being the general law and it would seem to follow that the authority of *Haskell* v. *Marlow* (*supra*) is likewise restored.

In *Brown* v. *Davies* the covenant was to "keep the interior clean and in good repair and decorated except as to dilapidation or damage from reasonable wear and tear . . ." The facts were that the tenant had done no internal repairs or decorations for at least five years and

it was held that he was not protected by the exception. The onus of proving that the state of the premises was attributable to fair wear and tear was on him, and this onus he had failed to discharge.

Conclusion

To sum up: the present state of the authorities would seem to be that the exception for fair wear and tear will not exempt a tenant from obligation to do something active in pursuance of his repairing covenant. If he seeks to rely on the exception he must prove affirmatively that the want of repair complained of is due exclusively to the elements or to normal user and has not been contributed to by his own failure to perform his express obligations.

CASE NOTES

Company

Bequest of shares in a company to itself—validity—power of company to direct transfer to nominees.—A testator by his will directed his trustees to hold one thousand shares in a private company in trust for his son for his life and on his death without issue to transfer them to the company. The son died without issue. On originating summons to determine the validity of the bequest, having regard to the rule of law that a company cannot be a member of itself, it was held that although the shares could not be transferred to the company itself, the company was entitled to direct that the shares should be transferred to proper nominees in trust for itself (*Re Castiglione's Will Trusts, Hunter* v. *Mackenzie*, [1958] 1 All E.R. 480).

Will

Administration and probate—executor's commission—no provision in will authorizing the solicitor-executor to charge for professional services—whether court may grant commission in respect of professional work rendered by a solicitor-executor.—The executors of the will of a testator applied to the court for commission for their pains and trouble in their administration of the estate. The will contained no provision authorizing the solicitor-executor to charge for professional services. The Master allowed

Will—continued

commission, but excluded therefrom the professional services rendered by one of the executors, who was a solicitor. Upon an application to have the certificate varied to include such professional services, it was held (overruling *Re Edmonds*, [1943] V.L.R. 97, and following *Re Craig* (1952), 52 S.R. (N.S.W.) 265) that the court had jurisdiction to grant commission to a solicitor-executor in respect of professional work which he had performed for the estate and for which he would not be able to make a direct charge (*Re Whitehead* (*deceased*), [1958] V.R. 143).

Construction—gift to M. or to his legal representative—death of M. in lifetime of testatrix — whether precatory words prevent lapse.—Unless a will discloses a clear intention that the gift should be substitutional and should not lapse, a gift after a life estate to a legatee or his personal representative lapses if the legatee predeceases the testator.

The testatrix left her residuary estate to trustees on trust after a life estate to pay or transfer it to M. or his legal personal representative with a request that it be distributed in such manner as the said M. or his legal personal representative shall think fit. M. predeceased the testatrix. It was held that the request annexed to the gift imposed no legal obligation on the donee and did not prevent the gift from lapsing. As the lapsed gift was of the residue it passed to the next of kin of the testatrix as property undisposed of (*Re Matthews, deceased, Wilson* v. *National Provincial Bank Limited*, [1958] V.R. 194).

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